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November 30, 2012

By ECFS

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: XO Communications Services, LLC Objection to FiberTower Corporation
Discontinuance of Service;

WC Docket No. 12-334, Comp. Pol. File No. 1066

Dear Ms. Dortch:

On behalf of XO Communications Services, LLC ("XOCS"), attached please find XOCS' Objection to FiberTower Corporation's Notification Regarding the Discontinuance of Telecommunications Service.

Please contact the undersigned at (202) 342-8614, if you have any questions regarding this filing.

KELLEY DRYE & WARREN LLP

Marlene Dortch
November 30, 2012
Page Two

Respectfully submitted,



Thomas Cohen

Denise N. Smith

Counsel to XO Communications Services, LLC

Attachment

cc: Carmell Weathers, FCC (via e-mail)
Kimberly Jackson, FCC (via e-mail)
Jean L. Kiddoo, Bingham (via e-mail)
Brett P. Feranchak, Bingham (via e-mail)

**Before the
Federal Communications Commission
Washington, D.C. 20554**

_____)	
In re)	
)	WC Docket No. 12-334
FiberTower Corporation)	
Discontinuance of Service)	Comp. Pol. File No. 1066
_____)	

**OBJECTION OF XO COMMUNICATIONS SERVICES, LLC TO
FIBERTOWER CORPORATION NOTIFICATION REGARDING THE
DISCONTINUANCE OF TELECOMMUNICATIONS SERVICE**

XO Communications Services, LLC (“XOCS”), by its attorneys, and pursuant to the Public Notice in the above-referenced proceeding¹ submits these comments in objection to FiberTower Corporation’s (“FiberTower” or the “Company”) Notification Regarding Discontinuance of Telecommunications Service (“Discontinuance Filing”).² In its Discontinuance Filing, FiberTower “notified” the Federal Communications Commission (“FCC” or “Commission”) of the Company’s intention to discontinue all of its domestic telecommunications services, including its point-to-point wireless services, “on or about

¹ *Public Notice, Comments invited on Application of FiberTower Corporation to Discontinue Domestic Telecommunications Services*, WC Docket No. 12-334, Comp. Pol. File No. 1066, DA 12-1848 (rel. Nov. 15, 2012).

² *In re: FiberTower Corporation Discontinuance of Service*, Notification Regarding the Discontinuance of Telecommunications Service (Nov. 9, 2012) (“Discontinuance Filing”).

December 9, 2012.”³ FiberTower claims that it is an interstate private carrier and thus its service discontinuance is not subject to the discontinuance procedures and requirements of sections 63.71 or 101.305 of the Commission’s rules, 47 C.F.R. §§63.71, 101.305. XOCS objects to FiberTower’s request. Despite diligent efforts to secure substitute service, XOCS faces significant harm because it will be unable to obtain reasonable substitute services from another carrier prior to FiberTower’s proposed service discontinuance date. In addition, permitting service discontinuance on the date requested by FiberTower would not be in the public interest. XOCS relies on the services it receives from FiberTower to serve XOCS’ customer and the proposed discontinuance timeframe will preclude XOCS from being able to continue serving its customer. Moreover, FiberTower has negotiated an agreement with other customers to extend the service discontinuation date until at least April 30, 2013, and should be required to provide a similar extension, until April 30, 2013, to XOCS. Finally, XOCS contests FiberTower’s assertion of private carrier status and argues FiberTower is operating as a common carrier and cannot discriminate when terminating service to its customers. For these reasons, the Commission should deny FiberTower’s discontinuance request or grant the request subject to the conditions proposed herein.

XOCS is cognizant that FiberTower’s counsel filed an *ex parte* communication on November 29, 2012 discussing the agreement it “has reached with certain carrier customers to extend its discontinuance date to April 30, 2013” and stating that it will “withdraw the discontinuance notification it filed on November 9, 2012,” and will “file a notification at the Commission reflecting the new April 30, 2013, discontinuance date.”⁴ XOCS is heartened by

³ *Discontinuance Filing* at 1.

⁴ *Ex Parte* Communications to Marlene H. Dortch, Federal Communications Commission, from Jean L. Kiddoo, Counsel for FiberTower, WC Docket 12-334 (Nov. 29, 2012) (“FiberTower *Ex Parte*”).

this filing. It is a reasonable way to proceed given the additional time customers need to secure alternative transmission arrangements. However, because the withdrawal has yet to occur, XOCS is filing this objection out of an abundance of caution and to preserve its rights.

I. BACKGROUND

XOCS is a direct, wholly-owned subsidiary of XO Communications, LLC (“XO LLC”) which, in turn, is a direct wholly-owned subsidiary of XO Holdings. XO LLC is a leading national provider of local and long distance telecommunications services to businesses, large enterprises and telecommunications carriers. XO LLC is authorized by the Federal Communications Commission to provide interstate and international telecommunications services. Through its subsidiaries – primarily XOCS – XO LLC is authorized to provide intrastate interexchange services in 49 states and to provide competitive local exchange services in 48 states as well as the District of Columbia.

Pursuant to a Private Line Service Agreement (“Service Agreement”), dated February 10, 2011, with FiberTower, XOCS purchased from FiberTower a DS3 wireless point-to-point circuit with originating and terminating points in Washington, D.C. The parties contracted for a 36 month service term and intended for the Service Agreement to continue in effect thereafter until either party agreed to cancel. XOCS purchased this circuit for a major customer for the specific purpose of providing transmission path diversity. XOCS’ customer is an international accounting firm with an office in Washington D. C., and the ability to transmit and exchange information electronically, particularly at the end of the year, is critical to the customer’s business. Due to specific customer requirements, XOCS must ensure that the transmission facility used for the customer is completely diverse, and XOCS may not utilize a hot cut when transitioning the customer to a new facility. Accordingly, XOCS faces unusual challenges in identifying and transitioning its customer to substitute facilities.

II. XOCS IS UNABLE TO OBTAIN SUBSTITUTE SERVICES FROM AN ALTERNATIVE SERVICE PROVIDER BEFORE FIBERTOWER'S PROPOSED SERVICE TERMINATION DATE

Despite diligent efforts to identify an alternative service provider for the DS3 circuit XOCS currently purchases from FiberTower, XOCS will be unable to obtain replacement service before FiberTower's December 9, 2012 termination date or even the Commission's December 16 termination date. Prior to receiving notice from FiberTower earlier this month, XOCS was unaware of the potential for discontinuance of FiberTower's service and has been given little time to find a replacement service provider for the discontinued DS3 circuit. While XOCS personnel have had business communications with FiberTower personnel and FiberTower's financial difficulties were raised, FiberTower personnel never gave any indication that the Company might cease providing service. FiberTower personnel appeared confident that the Company would be able to emerge from any bankruptcy proceeding with an arrangement that would permit the Company to continue operating. Consequently, XOCS had no reason to be concerned or begin looking for alternative service providers prior to receiving the discontinuance notice.

XOCS did not become aware of any possible service termination until it received notice from FiberTower earlier this month. By letter dated November 9, 2012, FiberTower notified XOCS of FiberTower's planned discontinuance of XOCS' DS3 circuit.⁵ FiberTower's *Discontinuance Filing* states that the Company sought bankruptcy protection in July 2012 and

⁵ See Letter to XO Communications Services, Inc. from Joseph M. Sandri, Jr., FiberTower Corporation (dated Nov. 9, 2012). There is no indication in the letter regarding the delivery method used, but the letter was not received by XOCS until November 16, 2012. In addition to the unusual delay in receipt, the notice was not sent in accordance with the parties' Service Agreement and this may have caused the delivery delay. The Service Agreement requires that notices to XOCS be sent to the Vice President of Telco Audit and to the Assistant General Counsel. However, FiberTower instead sent the notice to the attention of XOCS' "General Counsel."

has been keeping many of its customers apprised of the bankruptcy proceeding.⁶ Accordingly, as FiberTower noted, “such customers have had considerable notice of FiberTower’s financial circumstances” and “[t]hey have therefore been aware for some time of the possibility that services provided over FiberTower’s legacy network may be terminated as a result of the ongoing bankruptcy.”⁷ Unfortunately, XOCS was not one of those customers and had not been advised of a potential service termination. As a result, XOCS actually has been given insufficient notice of the need to secure service from another provider. Moreover, XOCS received no further outreach from FiberTower regarding the service cancellation until XOCS personnel contacted FiberTower on November 28, 2012 to discuss extension of service consistent with the terms FiberTower offered to the other group of FiberTower customers.

Upon receiving the service termination notice, XOCS immediately began searching for an alternative vendor for the DS3 circuit. However, XOCS’ search was hindered by its customer’s service requirements which limited the number of acceptable alternative service providers. Specifically, XOCS’ customer requires that its circuit be completely diverse. As a result, XOCS is unable to purchase a circuit directly from Verizon, the largest wireline provider in the Washington area, since the customer’s other carrier was using a Verizon circuit. XOCS eventually was able to identify an alternative service provider but the provider cannot install XOCS’ circuit before either the December 9 (FiberTower’s proposed discontinuance date) or December 16 (the Commission’s default service termination date). XOCS was informed by the alternative provider that it will take at least thirty (30) days, and more likely sixty (60), from the firm order confirmation date before the circuit will be active. Moreover, due to its customer’s specific requirements, XOCS will not be able to use a hot cut to transition its

⁶ *Discontinuance Filing* at 3-4.

⁷ *Id.* at 3.

customer's traffic to XOCS' new circuit. Instead, XOCS will need to install a new router, test the new circuit, and have it working before taking the old circuit down. This process will add to the time required for XOCS to transition from its FiberTower DS3 circuit. In fact, it could take as long as four months for XOCS to complete the transition process. Accordingly, XOCS may need to utilize its FiberTower DS3 circuit until April 30, 2013.

III. FIBERTOWER IS EXTENDING THE SERVICE TERMINATION DATE FOR SOME CUSTOMERS AND SHOULD BE REQUIRED TO EXTEND XOCS' SERVICE TERMINATION DATE UNTIL APRIL 30, 2013

FiberTower has agreed to extend its service termination date for certain of its customers and should be required to make similar extensions for other customers upon request. FiberTower's *Discontinuance Filing* notes the Company has been working with certain of its customers regarding the bankruptcy proceeding but the Company failed to update the record to note it already has entered into an agreement to extend the service termination date for those customers. It was AT&T, writing on behalf of itself and a few of FiberTower's other customers, that supplemented FiberTower's discontinuance proceeding and notified the Commission that FiberTower had agreed to extend its service termination date until April 30, 2013 for several of its customers.⁸ FiberTower has already sought, by motion filed November 21, 2012, approval of that service termination date extension agreement from the United States Bankruptcy Court for the Northern District of Texas.⁹ The *Termination Extension Motion* identified the participating carrier customers as T-Mobile USA, Inc., MetroPCS Wireless Inc., MetroPCS Texas, LLC, Cricket Communications, Inc., Sprint Spectrum, L.P., Sprint Communications Company, L.P.,

⁸ See Letter to Marlene H. Dortch, Federal Communications Commission from Robert C. Barber, AT&T, WC Dkt. 12-334 (Nov. 23, 2012).

⁹ See, *In re: FiberTower Network Services Corp., et al.*, Debtor's Motion for Approval of Binding Term Sheet With Participating Carriers for Migration of Services Off Debtors' Backhaul Network and Wind-Down of Debtors' Business, Case No. 12-44027-DML-11 (Nov. 21, 2012) ("Termination Extension Motion").

Nextel of California, Inc., Nextel Communications of the Mid-Atlantic, Inc., Nextel of New York, Inc., Nextel South Corp., Nextel of Texas, Inc., Nextel West Corp., Nextel Partners, Inc., AT&T Services, Inc., Clear Wireless LLC and Cellco Partnership d/b/ a Verizon Wireless.¹⁰ In addition to FiberTower keeping certain customers apprised of the Company's status, the *Termination Extension Motion* reveals that FiberTower began actively negotiating with those customers in early November to "try to find a way to minimize the impact on them of a shutdown of the Debtors' network."¹¹ The *Termination Extension Motion* also notes that those customers notified FiberTower that they needed more than thirty (30) days to transition from FiberTower's network to other networks.¹² Consequently, FiberTower is aware that its customers likely will not be able to obtain substitute services by the planned termination date and apparently is willing to extend that date to meet its customers' needs. As stated above, XOCS is aware and appreciative of the FiberTower *Ex Parte* discussing withdrawal and refiling of the notice with an April 30, 2013 discontinuance date.

As noted above, XOCS will be unable to obtain replacement services by the planned termination date and requests that FiberTower not be permitted to terminate XOCS' circuit before April 30, 2013. Even FiberTower acknowledged that its planned termination date may not be reasonable, noting in its *Termination Extension Motion* that "[w]ere the Debtors to forge ahead with a network shutdown in early December . . . there would be significant negative impact on not only the carriers, but also the services they provide to their own customers."¹³ FiberTower clearly recognizes the difficulties its customers face in obtaining substitute service,

¹⁰ *Termination Extension Motion* at 6, n.4.

¹¹ *Termination Date Extension Motion* at 5-6, ¶15.

¹² *Id.*

¹³ *Id.* at 10-11, ¶23.

and the Company appears willing and able to continue providing service beyond its planned termination date. The Commission should require FiberTower to consult with XOCS and extend the termination date of XOCS' circuit until April 30, 2013.

IV. FIBERTOWER IS OPERATING AS A COMMON CARRIER AND CANNOT DISCRIMINATE IN ITS TERMINATION OF SERVICES

As a common carrier, FiberTower is prohibited from providing service in a discriminatory manner and thus cannot choose to terminate service to some customers and maintain the same services for other customers. In its *Discontinuance Filing* FiberTower asserts it is an “interstate private carrier,” not a common carrier and notified its customers and the Commission of the planned service termination only “out of an abundance of caution.”¹⁴ However, XOCS submits that FiberTower is operating as a common carrier.

Carriers operate on a common carriage basis when they hold themselves out to “serve indifferently all potential users” and allow customers to “transmit intelligence of their own design and choosing.”¹⁵ Common carriers offer their services on generally available terms and conditions and do not negotiate individually with customers.¹⁶ FiberTower appears to meet the criteria for classification as a common carrier. FiberTower’s website describes its services in detail and declares the suitability of its services for use by numerous types of customers: wireless carriers, enterprises, service providers, state, county, municipal, city, or tribal government entities, public authorities, school districts, colleges and other institutions of higher education.¹⁷ In addition, FiberTower’s website does not identify any service limitations or indicate that

¹⁴ *Discontinuance Filing* at 1.

¹⁵ See, e.g., *Universal Service (Definition of “Telecommunications Carrier” - Petition of Iowa Telecommunications and Technology Commission)*, 14 FCC Rcd 3040, ¶21 (1999).

¹⁶ *Id.*, ¶16.

¹⁷ See e.g., “FiberTower Solutions” at <http://www.fibertower.com/corp/solutions.shtml>; <http://www.fibertower.com/corp/solutions-government.shtml>; <http://www.fibertower.com/corp/solutions-spectrum.shtml>.

services will be provided differently to different customers. Consequently, FiberTower exhibits all the characteristics of a carrier holding itself out to serve the public on nondiscriminatory terms. FiberTower further permits its customers to transmit information of the customer's choosing. FiberTower also appears to offer its services on generally available terms without individual customer negotiation. Accordingly, FiberTower meets the criteria for classification as a common carrier.

FiberTower has entered into an agreement with other customers to extend provision of the same common carrier services that FiberTower proposes to discontinue providing to XOCS. Section 202 of the Communications Act of 1934, as amended (the "Act") prohibits common carriers from discriminating in their practices and services.¹⁸ Consequently, any decision by FiberTower to terminate services to XOCS on December 9, 2012 but continue to provide the same services to other carriers until April 30, 2013 would be discriminatory conduct prohibited by the Act. Accordingly, FiberTower must not be permitted to force XOCS to accept a December 9, 2012 service termination date or the default date of December 16, 2012, while agreeing to continue providing the same service to other customers and instead, FiberTower should be required to extend XOCS' service termination date upon XOCS' request.

¹⁸ See 47 U.S.C. §202(a).

V. CONCLUSION

For the foregoing reasons XOCS objects to FiberTower's proposed termination of XOCS' DS3 circuit on December 9, 2012 as well as a default termination date of December 16, 2012, and requests the Commission require FiberTower to negotiate an extension, as it has done with other customers, and continue providing the circuit to XOCS until April 30, 2013.

Respectfully Submitted,



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Counsel to XO Communications Services, LLC

November 30, 2012

ATTESTATION

I, Eric Miller, state that I am Sr. Manager of XO Communications Services, LLC ("XOCS"), and am authorized to represent XOCS, and to make this attestation on its behalf. The statements in the foregoing document relating to XOCS, except as otherwise specifically attributed, are true and correct to the best of my knowledge and belief.

I declare under penalty of perjury that the foregoing is true and correct.



Name: Eric Miller

Title: Sr. Manager, Business Development

Executed on November 30 2012.